90-511

No.

Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1990

MICHAEL MA,

Petitioner,

v.

CONTINENTAL ILLINOIS NATIONAL BANK & TRUST COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

ARTHUR L. KLEIN*
HAL R. MORRIS
RAANA C. RAFIULLAH
ARNSTEIN & LEHR
120 South Riverside Plaza
Suite 1200
Chicago, Illinois 60606
(312) 876-7100

Counsel for Petitioner.
**Counsel of Record*

ARNSTEIN & LEHR
120 South Riverside Plaza
Suite 1200
Chicago, Illinois 60606
(312) 876-7100
Of Counsel.

QUESTION PRESENTED

Whether an American bank may properly exercise the unilateral and unchecked power to transfer a foreign investor's assets to another country without affording the investor an opportunity to object or any other procedural protection?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES: *Page*

STATUTES, RULES AND OTHER AUTHORITY:

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner respectfully requests that a Writ of Certiorari issue to review the decision and judgment of the United States Court of Appeals for the Seventh Circuit, entered on June 21, 1990. In a two to one decision, the Seventh Circuit affirmed a decision of the United States District Court for the Northern District of Illinois which granted Respondent's motion for summary judgment.

OPINION BELOW

The opinion of the Seventh Circuit is officially reported at 905 F.2d 1073 (7th Cir. 1990). It is reprinted in the appendix to this petition, commencing at page 1a. Neither the memorandum opinion and order of the District Court granting summary judgment to Respondent (appendix, p. 9a) nor the District Court's Order denying Petitioner's motion for reconsideration (appendix, p. 13a) are reported.

JURISDICTION OF THIS COURT

Judgment was entered by the Court of Appeals for the Seventh Circuit on June 21, 1990. (appendix, p. 14a). This Court has jurisdiction to review that judgment pursuant to 28 U.S.C. §1254(1).

STATUTE INVOLVED

This case involves Section 304 of the Bankruptcy Code, 11 U.S.C. §304, which provides:

CASES ANCILLARY TO FOREIGN PROCEEDINGS

(a) A case ancillary to a foreign proceeding is commenced by the filing of a petition under this section by a foreign representative.

(b) Subject to the provisions of subsection (c) of this section, if a party in interest does not timely controvert the petition, or after trial, the court may—

(1) enjoin the commencement or continuation of—

(A) any action against—

(i) a debtor with respect to property involved in such foreign proceeding; or

(ii) such property; or

(B) the enforcement of any judgment against the debtor with respect to such property, or any act or the commencement or continuation of any judicial proceeding to create or enforce a lien against the property of such estate;

(2) order turnover of the property of such estate, or the proceeds of such property, to such foreign representative; or

(3) order other appropriate relief.

(c) In determining whether to grant relief under subsection (b) of this section, the court shall be guided by what will best assure an economical and expeditious administration of such estate, consistent with—

(1) just treatment of all holders of claims against or interests in such estate;

(2) protection of claim holders in the United States against prejudice and inconvenience in the processing of claims in such foreign proceeding;

(3) prevention of preferential or fraudulent dispositions of property of such estate;

(4) distribution of proceeds of such estate substantially in accordance with the order prescribed by this title;

(5) comity; and

(6) if appropriate, the provision of an opportunity for a fresh start for the individual that such foreign proceeding concerns.

STATEMENT OF THE CASE

This petition arises from the District Court's Order granting Respondent's cross-motion for summary judgment and the Circuit Court's affirmance of that Order. Petitioner, Michael Ma ("Ma"), commenced this action against Respondent, Continental Illinois National Bank & Trust Company, ("the Bank"), seeking to recover $157,432.37 (plus interest) taken by the Bank from Ma's money market bank account with the Bank and sent to a purported bankruptcy Receiver in Hong Kong.

Ma, a citizen of the People's Republic of China, opened a money market account with the Bank on December 6, 1984. The deposit contract explicitly stated that it was subject to Illinois and federal law. Under the terms of this "Account Agreement," money could be withdrawn from the account only at the request or assent of the depositor.

In 1985, a judgment creditor commenced an involuntary bankruptcy proceeding against Ma in Hong Kong, and the Register General of Hong Kong was appointed as the Receiver and Trustee of Ma's bankruptcy estate. Ma never received notice of the involuntary bankruptcy proceeding. Nonetheless, on April 1, 1985, a Hong Kong Court entered an *ex parte* receiving order against Ma. Ma did not receive notice of the *ex parte* order.

The purported Hong Kong Receiver began marshalling the assets of Ma's Hong Kong estate, despite the lack of notice to Ma. On April 18, 1985, the Receiver demanded that Continental Illinois Bank Limited ("Limited"), a Cayman Island Banking corporation doing business in Hong Kong (*not* the Respondent Bank) close Ma's accounts with Limited and remit the proceeds to the Receiver. On or about April 29, 1985, Limited complied with this demand.

On June 5, 1985, the Receiver again demanded that Limited "close [Ma's] accounts and remit to this office the credit balance(s)." Apparently in response to this second demand, Limited telexed the Bank in Chicago and requested copies of Ma's bank statements there. The Bank supplied those statements without informing Ma.[1]

On June 26, 1985, the Receiver notified Limited that it was in receipt of a statement for Ma's money market account with the Bank in Chicago. At that time, the Receiver wrote to Limited and stated:

> I am faced with the difficulty of having your Chicago branch[2] at which the account is held recognize [sic] the Hong Kong receiving order which has been made against Ma, and my subsequent appointment as trustee in bankruptcy.
>
> *Would you please advise me that the policy of your Chicago branch will be. Is it likely that my Hong Kong appointment would be recognized [sic], or would I have to obtain an order from a local court in Chicago to enable me to recover the money*? Obviously it at all possible, I would wish to avoid the difficulty and expense of having to take action in the U.S. (Emphasis added).

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[1] The Bank is a national banking corporation doing business in Illinois and Limited is now a subsidiary of the Bank. The two are and were, of course, separate corporations.

[2] Although the Bank was not then and never was a "branch" of Limited, neither the Bank nor Limited ever attempted to clarify this point with the Receiver. As noted above, they are in fact separate corporations.

In response to this correspondence and despite the Receiver's plain acknowledgment that United States court orders were necessary for his appointment to be recognized in the United States by the Bank, Limited simply sent a telex to the Bank asking it to close Ma's account and requesting a "demand draft" and "debit" of the $157,432.37 involved in this action. On the basis of Limited's request alone, without receiving a demand or any other request directly from the Receiver or Ma, and without even notifying Ma, the Bank closed his account and sent the account balance of $157,432.37 to Limited on July 1, 1985.

On July 3, 1985, *after* the Bank had already closed Ma's account and transferred his funds at the request of Limited, the Bank received its very first correspondence from the Receiver. It asked:

> Whether, in the first instance, your bank [e.g., Respondent] will acknowledge that I have a claim to the money and freeze the account until any requirements to establish my entitlement have been complied with, *would you also advise me what steps the bank will require that I take so establish my entitlement, and eventually recover the money.* (Emphasis added).

The Receiver thus recognized again what the Bank chose to ignore, i.e. that procedural steps in this Country were required *before* the Receiver could even seek Ma's funds from the Bank.

In March of 1987, Ma moved to set aside the involuntary bankruptcy proceeding and *ex parte* receiving order in Hong Kong. The Hong Kong court granted Ma's motion and dismissed the bankruptcy for lack of personal jurisdiction. In dismissing the bankruptcy, the Hong Kong court observed that Ma had been denied even the most fundamental and minimal notion of due process since he was never served. In September of 1988, with the Hong Kong bankruptcy now dismissed, Ma brought this action against the Bank in the United States District Court for the Northern District of Illinois seeking the return of his $157,432.37 money market account.[3]

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[3] Jurisdiction in the District Court was based on complete diversity of citizenship between Ma, a Chinese citizen, and the Bank, an Illinois corporation with its principal place of business in Illinois. The amount in controversy, exclusive of interest and costs, exceeded the jurisdictional amount. 28 U.S.C. §1332.

On August 3, 1989, the District Court ruled on cross-motions for summary judgment. It held that, assuming the Bank had breached its contract with Ma by transferring Ma's funds at Limited's request, Ma had suffered no damages as a result of the Bank's breach.[4] Therefore, the District Court entered judgment in favor of the Bank (appendix, p. 9a) and, on August 16, 1989, denied Ma's motion for reconsideration. (appendix, p. 13a).

Ma appealed to the United States Court of Appeals for the Seventh Circuit which affirmed the District Court in a two-to-one decision. The Circuit Court assumed that the Bank breached its deposit contract with Ma and that Ma owns the right of action against the Bank, but stated that "[t]here is still a matter of causation." (appendix, p. 3a). On this issue, the Court retrospectively concluded that the Bank's failure to follow the "formal" procedures set forth in Section 304 of the Bankruptcy Code "seem[ed] to work for rather than against Ma: had the receiver filed suit in this country to obtain a §304(b)2 order, the costs of administration would have been higher than they were." (appendix, p. 3a).

The Court of Appeals' holding retroactively blessed the Bank's deliberate refusal to accord Ma even the minimal procedural protections of Section 304(b)(2) — protection that even the Hong Kong Receiver repeatedly suggested should be invoked — by rationalizing that "'the procedures the Bank followed did not cause Ma any loss." (appendix, p. 7a). To the contrary, however, as Judge Cudahy noted in his partial dissent, "[t]o allow Banks willy-nilly to ship their depositors funds on demand to foreign receivers in hope that the requests will subsequently prove legitimate seems to me very bad policy indeed." (appendix, p. 7a). However, it is that very bad policy which the Bank followed and which the courts have thus far permitted. Petitioner respectfully urges that a Writ of Certiorari be granted to review and correct those decisions.

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[4] The District Court's ruling is not supported by the record. An uncontroverted Affidavit, signed by Ma, unequivocally establishes that after taxation of costs, no funds were left in the hands of the Hong Kong Receiver to return to Ma. On appeal the Seventh Circuit recognized this fact but nevertheless affirmed the District Court.

REASONS FOR GRANTING THE PETITION

I. The Bank Should Not Have Released Ma's Funds To a Foreign Receiver Unless And Until A Petition Was Filed Under Section 304.

The Bank should not have released Ma's funds to Limited, to the foreign Receiver, or to anyone else but Ma himself, absent a United States court order directing it to do so. The Bank was clearly obligated to require the Hong Kong Receiver to initiate an "ancillary proceeding" (11 U.S.C. §304(a)) with a bankruptcy court in Illinois before it transferred Ma's funds to Limited in Hong Kong.[5]

As Judge Cudahy stated in partial dissent:

> There is absolutely no legal basis for the Bank to release funds at the request of a foreign receiver unless and until a petition has been filed under 11 U.S.C. section 304 to authorize ancillary proceedings in Illinois. At that point, a judge in Illinois may direct the surrender of the funds.

(appendix, p. 7a).

To say the very least, "the preferable procedure is to have the ancillary proceeding brought in the United States bankruptcy court so that the provisions of 11 U.S.C. §304 (b) and (c) can be applied by the bankruptcy court here to determine whether or not plaintiff's claim should be adjudicated here or in [the foreign country]." *RBS Fabrics Ltd. v. G. Beckers & Le Hanne,* 24 Bankr. 198, 200 (S.D.N.Y. 1982).

Section 304(c) is designed to give a court maximum flexibility in handling ancillary cases. Principles of international comity and respect for the judgments and laws of other nations suggest that the courts should fashion appropriate orders in light of the circumstances of each case, rather than following inflexible rules. H. REP. NO. 595, 95th Cong., 2d Sess. 324-25, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 5963, 6281.

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[5] Indeed, as the Bank's own deposit agreement was subject to Illinois and Federal law — which provide for ancillary proceedings — the Bank nevertheless chose to breach its agreement and not apply Section 304.

In addition, before a foreign bankruptcy may be accorded recognition in this country, a United States court must consider general principles of comity to determine if the foreign laws comport with due process and fairly treat the claims of any local creditors. *Victrix S.S. Co., S.A. v. Salen Dry Cargo A.B.*, 825 F.2d 709, 714 (2d Cir. 1987). For comity to be extended, a court here must *first* be satisfied that the foreign court has abided by fundamental standards of procedural fairness akin to our concept of due process. *See Cunard S.S. Co. v. Salen Reefer Service AB*, 773 F.2d 452, 457 (2d Cir. 1985). Only after the court determines that "fundamental standards of procedural fairness" were followed in the foreign forum can a foreign creditor, or Receiver, enforce a judgment against the debtor or the property of the debtor, or "order other appropriate relief." 11 U.S.C. §304(b).

Congress enacted Section 304 for the very purpose of dealing with the complex problems involved in determining the legal effect to be accorded foreign bankruptcy proceedings. The section was specifically intended to govern situations like this one, where a foreign creditor sought to seize United States assets of a debtor. *See Cunard S.S. Co. v. Salen Reefer Services AB*, 773 F.2d 452, 454-455 (2d Cir. 1985), *citing*, S. REP. NO. 989, 95th Cong., 2d Sess. 35, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS, 5787, 5821; H. REP. NO. 595, 95th Cong., 2d. Sess. 324-25, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS, 5963, 6281.

But the Bank single-handedly undermined and evaded Congressional intent and well-settled principles of procedural fairness by ignoring the judicial process mandated by Section 304. It is unfathomable that the Bank, or anyone holding another's assets, can be permitted to unilaterally deny foreign investors the procedural protections guaranteed by Section 304. As Judge Cudahy recognized, this is "very bad policy indeed."

The seemingly confident assertion of the Circuit Court majority "that, had the receiver made an application to the district court pursuant to section 304, the Hong Kong receiver's credentials would certainly have been accepted despite the service defect," (appendix, p. 7a, Cudahy, J., *concurring in part, dissenting in part*) is, to say the least, misplaced. Personal service is the very cornerstone of jurisdiction. *See International Shoe Co. v. Washington*, 326 U.S. 316, 317 (1945). The Hong Kong

bankruptcy court which entered the *ex parte* receiving order lacked jurisdiction for that reason, as the Hong Kong courts themselves concluded. The majority's gratuitous conjecture cannot "legitimate retroactively the unauthorized release of the funds by the Bank." (appendix, p. 7a).

In short, Ma was entitled to the fundamental right and opportunity to demonstrate that the Hong Kong bankruptcy court lacked jurisdiction and that its orders were therefore incapable of enforcement here. Upon the commencement of an ancillary proceeding, Ma was entitled to notice so that he would have had the opportunity to collaterally attack the receiving order and/or object to the Receiver's authority to act pursuant to the order here. Unlike the Bank, which acted on its own, a court is obliged to consider the guidelines set forth in Section 304(c) and principles of comity to determine whether or not to recognize a foreign bankruptcy proceeding. In order to be entitled to comity, the foreign court must obtain valid personal jurisdiction over the defendant (*Cunard,* 773 F.2d at 457) and the proceeding must comport with fundamental standards of procedural fairness. *See Interpool, Ltd. v. Certain Freights of M/V Venture Star,* 102 Bankr. 373, 377 (D.N.J. 1988). Given the facts of this case, a United States court would necessarily have concluded, as the Hong Kong court later did, that the Hong Kong bankruptcy proceeding was invalid for lack of jurisdiction and thus could *not* receive recognition here.

This Court has unequivocally recognized that "an elementary and fundamental requirement of due process in *any* proceeding which is to be accorded finality is notice. . . ." *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 314 (1950) (emphasis added). As the Hong Kong appellate court held:

> [H]ad the judge who heard the [bankruptcy] petition directed his mind to the question of proof of service, he could not have been satisfied with it. It follows then that he had no power to make the order that he did.

If an ancillary proceeding had been initiated, a court here would, at the very least, have had the power to stay enforcement of

the receiving order, or "order other appropriate relief," 11 U.S.C. §304(b), pending resolution of the jurisdictional issue in Hong Kong.

Instead of deferring to the courts, as the Hong Kong Receiver himself suggested, the Bank assumed supreme decision-making authority to rule on the legitimacy of the Hong Kong bankruptcy proceeding and the *ex parte* receiving order. In so doing, it blatantly ignored Ma's rights to notice and a hearing under Section 304 when it gave away his money.

The fate of Ma's funds, and the funds of any foreign investor, should not be left to the haphazard whim of a bank, acting alone. Indeed, the Bank had no specific procedural policy for dealing with situations such as this. No one entrusted with another's funds should be allowed to give them away at the "command" of a foreign receiver asking "help" in avoiding the "difficulty" and expense of the statutorily mandated, court administered, safeguards put in place to protect assets here. It is surely no answer to say, as the Seventh Circuit majority did, that the depositor "might have lost" his assets anyway.

II. The Bank's Unauthorized Release of Ma's Funds Without A Demand And Without Notifying Ma In Advance Offends Fundamental Notions of Due Process.

In erroneously upholding the Bank's unauthorized transfer of Ma's funds, the Seventh Circuit also ignored the conspicuous lack of any internal Bank procedures for dealing with funds of depositors who become involved in foreign bankruptcies.[6] The deposit agreement between Ma and the Bank states that accounts that are the subject of litigation "may" have "restricted access." But nowhere does the agreement refer to or permit the closing of accounts and transfer of funds without prior notice to the account owner or, at the very least, a valid United States court order. Clearly, it is reasonable and just for an account owner,

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[6] Quite illogically, the Bank notified Ma of a third-party request for information, but found it unnecessary to notify Ma before unilaterally closing his account and transferring the account balance half-way around the world.

like Ma, to expect notice before his account is taken, released or transferred by the Bank.[7]

Indeed, the Bank released Ma's funds without even receiving a demand from the foreign Receiver himself. Rather, the Bank transferred over $157,000.00 solely on the "authority" of a one-paragraph telex from another bank. As discussed *supra*, the Bank was obligated to require the Receiver to procure a United States court order before transferring Ma's funds. At a bare minimum, it was at least obligated to receive an "official" demand for Ma's funds from the Hong Kong Receiver himself and to give Ma notice of the demand.

The Bank's unauthorized transfer of Ma's funds, without notice or a demand, patently offends traditional concepts of due process. The Bank has, in effect, deprived Ma of his property without due process of law. *Accord, North Georgia Finishing, Inc., v. Di-Chem, Inc.*, 419 U.S. 601, 606, (1975). Although the Bank is not a state actor, and therefore not technically held to the same constitutional standards as a state or the federal government, the same procedural principles of fairness should apply. Section 304, indeed even a simple notice, would have provided the requisite protection so that Ma and other investors would not be subject to arbitrary or mistaken deprivations of property through unilateral conduct.

The central meaning of due process in this country is well established: "Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified." *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972) (citations omitted). The Bank should be held to no lesser duty. It should be required to follow a fair process of decision-making and notice before it is allowed to transfer or release the property of a depositor like Ma to a third-party — a process embodied in Section 304.

The fundamental requirements of notice and an opportunity to be heard are designed to protect an individual's "use and

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[7] The avenues of recourse available to Ma had he been notified (i.e., the ability to collaterally attack the receiving order or dispute the extension of comity to the foreign bankruptcy and receiving order) are discussed in detail at pages 9 and 10 *supra*.

possession of property from arbitrary encroachment — to minimize substantially unfair or mistaken deprivations of property." *Id.* at 81.[8] As this Court stated:

> [F]airness can rarely be obtained by secret, one-sided determination of facts decisive of rights. . . (and n)o better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it.

Joint Antifascist Refugee Committee v. McGrath, 341 U.S. 123, 170-172 (1951) (Frankfurter, J., *concurring).*

The Bank's conduct and the Seventh Circuit's legitimating decision plainly offend settled principles of procedural fairness. The Bank unilaterally decided that Ma was not entitled to an ancillary proceeding when it "excused" the foreign Receiver for initiating one. The Bank did not even require the Receiver to make a demand on the Bank before it released Ma's funds and it failed to notify Ma before it closed his account and transferred his funds. The Bank utterly failed to protect Ma from the arbitrary or mistaken deprivation of property and denied Ma his right to the operation of two fundamental procedural protections — notice and an opportunity to be heard.

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[8] In an analogous fashion, applying these principles, this Court requires certain procedures before an individual can be deprived of property pursuant to various state prejudgment remedy statutes. The due process principles underlying these cases apply by analogy to the Bank here as well. *See generally North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975) (A garnishment statute failed to satisfy due process because the garnished property was put totally beyond use during the pendency of litigation merely on the basis of a writ of garnishment issued by a court clerk without notice or opportunity for an early hearing and without participation by a judicial officer); *Fuentes v. Shevin*, 407 U.S. 67 (1972) (Replevin laws violated due process because they denied the possessor the right to a prior opportunity to be heard before chattels were taken, even though the possessor could regain possession by posting a security bond and had an opportunity for a post-seizure hearing); *Sniadich v. Family Finance Corp.*, 395 U.S. 337 (1969) (Prejudgment garnishment procedure which did not provide defendant with an opportunity to be heard violated due process). *But see Mitchell v. W.T. Grand Co.*, 416 U.S. 600 (1974) (State trial judge could order sequestration of property on the application of a creditor without notice and hearing if the opportunity given for *ultimate* judicial determination was adequate).

Significantly, the Seventh Circuit recognized that "[c]ourts of the United States enforce judgments provided that the parties had the opportunity to present their claims to foreign tribunals following procedures designed to secure a sound administration of justice." (appendix, p. 4a). However, it ignored the Bank's conduct altogether and surmised, after-the-fact, that Ma did not question the sufficiency of the Hong Kong procedures and did in fact have notice of the Hong Kong proceeding. *Id.* To the contrary, Ma repeatedly questioned not only the transfer but the jurisdiction of the Hong Kong court. Indeed, Ma eventually prevailed and the Hong Kong bankruptcy was found to be lacking in personal jurisdiction and therefore void *ab initio*. Notwithstanding this fact, the Seventh Circuit's retrospective rationalization of the Bank's conduct tacitly approved an obvious wrong. However, "[t]his Court has not . . . embraced the general proposition that a wrong may be done if it can be undone." *Stanley v. Illinois*, 405 U.S. 645, 647 (1972).

By upholding the Bank's unauthorized release of Ma's funds, the Seventh Circuit sends an ominous message indeed to foreign investors who contemplate future business with a bank in the United States. The message rings loud and clear; an American bank has free license to transfer a foreign investor's funds at the mere unsupported request of a foreign Receiver and without even first notifying the investor. If this is really the law, foreign investors around the world should and will surely think twice before depositing their assets in this Country's banks.

CONCLUSION

For each and all of the reasons set forth above, Petitioner respectfully requests this Court issue a Writ of Certiorari and thereafter rule that the judgment of the United States Court of Appeals for the Seventh Circuit be reversed.

Respectfully submitted,

ARTHUR L. KLEIN*
HAL R. MORRIS
RAANA C. RAFIULLAH
ARNSTEIN & LEHR
120 South Riverside Plaza
Suite 1200
Chicago, Illinois 60606
(312) 876-7100

Counsel for Petitioner.
**Counsel of Record*

ARNSTEIN & LEHR
120 South Riverside Plaza
Suite 1200
Chicago, Illinois 60606
(312) 876-7100
Of Counsel.

APPENDIX

APPENDIX

TABLE OF CONTENTS

PAGE

In the
United States Court of Appeals
For the Seventh Circuit

No. 89-2844

MICHAEL MA,

Plaintiff-Appellant,

v.

CONTINENTAL BANK N.A.,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 88 C 7827—**William T. Hart**, *Judge.*

ARGUED MAY 14, 1990—DECIDED JUNE 21, 1990

Before CUDAHY and EASTERBROOK, *Circuit Judges*, and SNEED, *Senior Circuit Judge.**

EASTERBROOK, *Circuit Judge.* Michael Ma, a citizen of the People's Republic of China, opened a money market account at Continental Bank N.A. on December 6, 1984, with a deposit of $150,000, transferred from Continental's subsidiary in Hong Kong, the same day a court of Hong Kong entered against Ma a judgment of HK $35 million, then equivalent to US $4.5 million. Ma left Hong Kong

* Hon. Joseph T. Sneed, of the Ninth Circuit, sitting by designation.

two days later for Toronto, leaving the judgment unsatisfied. Fong Sze Ming, the judgment creditor, commenced an involuntary bankruptcy proceeding against Ma in Hong Kong, and the court appointed the Registrar General of Hong Kong as the receiver and trustee of Ma's estate in bankruptcy.

In the course of marshalling the assets of the estate, P.K.C. Li, a solicitor representing the receiver, asked the Bank's subsidiary whether it held any of Ma's funds. Li learned that the funds formerly in the subsidiary's hands had been transferred to the parent, and he wrote the subsidiary asking what steps the Bank would require of him before remitting. The subsidiary then wrote Continental, "authorizing" it to transfer the money to the receiver. Continental did so on July 1, 1985, without notice to Ma. (Actually the Bank returned the money to its subsidiary, which remitted to the receiver; this detail is immaterial.)

The receiver collected more than US $400,000 from Ma's bank accounts and the sale of assets located in Hong Kong. In 1987 Ma asked the bankruptcy court to vacate the appointment on the ground that he had not been served with process. The bankruptcy court agreed with this argument. Before the question could be resolved on appeal, Ma settled with the judgment creditor. Ma abandoned to his creditor all assets in the hands of the receiver and paid an additional HK $9.1 million; the creditor withdrew his appeal of the order dismissing the bankruptcy case.

Ma then filed this suit against Continental under the alienage jurisdiction, 28 U.S.C. §1332(a)(2), contending that Continental broke its promise to hold the funds subject to his order. He asked for damages equal to the amount of the deposit plus interest. The district court granted summary judgment to the Bank, holding that Ma could not establish damages because the money went to the receiver and thence to Ma's creditor, so he received its value. The difficulty with this conclusion springs from Ma's affidavit, which informs us (without contradiction from the Bank) that the receiver's expenses of gathering

and selling the property consumed about half of its value, and that a combination of court costs and receiver's fees leaves little if any to turn over to the creditor. Given the posture of the case and the lack of an official report from the receiver detailing the disposition of the funds in his custody, we must assume that Ma received precious little credit against the judgment on account of the receiver's efforts. It is as if the receiver laid his hands on a Tang horse later smashed in transit: the creditor would allow in settlement no more than the value of the shards of pottery, and Ma would suffer injury equal to the difference between the horse whole and the rubble.

It does not follow that Ma is entitled to recover the $150,000 (or a horse) from the Bank. We may assume that the Bank broke the deposit contract. We also assume that Ma owns the right of action against the Bank. (Any claim on the contract may well be an asset of the estate in bankruptcy under Hong Kong law; we do not pursue the question because neither side noticed the difficulty.) There is still a matter of causation. Continental did not promise to resist or ignore lawful process. A receiver appointed in the United States would have been entitled to the funds without ado by virtue of 11 U.S.C. §542(b). A stakeholder who in good faith turns assets over to a trustee is not answerable for the trustee's subsequent acts, even if they greatly deplete the assets. *Restatement (Second) of Trusts* §321. Section 542 does not apply to a foreign trustee, but 11 U.S.C. §304 authorizes proceedings ancillary to foreign bankruptcy cases. Once the "foreign representative" (the generic statutory term for trustees, receivers, and the like) files a petition, the court may direct the stakeholder to surrender the assets, §304(b)(2). The receiver did not file a proceeding under §304, so the Bank does not get the immunity a judicial turnover order would have provided, but the omission seems to work for rather than against Ma: had the receiver filed suit in this country to obtain a §304(b)(2) order, the costs of administration would have been even higher than they were.

Not so fast!, Ma rejoins. If the receiver had filed an ancillary action under §304, he would have been met by the defense that the Hong Kong court should have dismissed the creditor's petition without appointing a receiver. Yet nothing in §304 suggests that an American court will indulge a collateral attack on the appointment of a receiver. Courts of the United States enforce foreign judgments provided that the parties had the opportunity to present their claims to foreign tribunals following procedures designed to secure a sound administration of justice. E.g., *Hilton v. Guyot*, 159 U.S. 113, 202-03 (1895); *Clarkson Co. v. Shaheen*, 544 F.2d 624 (2d Cir. 1976), applied to a case under §304 by *In re Gee*, 53 B.R. 891 (Bankr. S.D. N.Y. 1985). Section 304 applies to any "foreign representative"; the receiver unquestionably was such a person. Hong Kong used the legal procedures of the United Kingdom; Ma does not question the sufficiency of the procedures available there. He also does not contend that the considerations listed in §304(c) offered sufficient reason not to enter a turnover order.

Matters are a little more complex because of the principle that a collateral attack on a foreign judgment is possible when the foreign court lacks jurisdiction, *Koster v. Automark Industries, Inc.*, 640 F.2d 77 (7th Cir. 1981), and Ma stresses that in 1987 a court in Hong Kong vacated the proceeding because of failure to serve process on Ma personally. *Ex parte Fong Sze Ming*, 1987 No. 77 (H.K. Ct. App.). One obstacle to this analysis, which the Bank does not mention, is that the appointment of a receiver is not a "judgment"; it may well be that procedural steps leading to a judgment should be recognized in the United States prior to service. See *Cunard S.S. Co. v. Salen Reefer Services AB*, 773 F.2d 452, 457-58 (2d Cir. 1985); *In re Enercons Virginia, Inc.*, 812 F.2d 1469, 1473 (4th Cir. 1987). One further complication is that the receiver in Hong Kong may have had authority ("jurisdiction") because of the location of assets there; principles of *in rem* and *quasi in rem* jurisdiction do not depend on jurisdiction over the person of all claimants. See *Canada*

Southern Ry. v. Gebhard, 109 U.S. 527 (1883). None of the parties makes anything of this either, so we shall press on.

Although service of process is an ingredient of personal jurisdiction as that term often is used in the United States, not all of the technical requirements of service are sufficient grounds for a collateral attack. Service is designed to produce knowledge; although rules may and usually do require formal service in order to make very sure of knowledge, and courts may dismiss a case when proper service has not been secured, the sort of jurisdiction pertinent to a collateral attack depends on whether the service is constitutionally adequate—that is, whether the plaintiff uses a method reasonably calculated to produce actual notice. *Wuchter v. Puzzuti*, 276 U.S. 13 (1928). (Although Hong Kong is not bound by our notions of due process, recognition of foreign judgments is a matter of comity, and as *Hilton* explains the United States will not enforce a judgment obtained without the bare minimum requirements of notice—although it does not insist on the additional niceties of domestic jurisprudence.)

Process was mailed to Ma at his Hong Kong residence. This is reasonably calculated to produce notice, especially when (as here) the party has not told anyone he has moved permanently (and, if so, to where). *Virginia Lime Co. v. Craigsville Distributing Co.*, 670 F.2d 1366 (4th Cir. 1982) (mail to last known address is constitutionally sufficient). Ma did not receive the notice, because he treated his journey to Canada as more than a vacation, but he had actual knowledge of the proceeding. His daughter, who still lived at his house, called him in Switzerland (where he now resides) and told him about the case; Ma authorized his daughter to engage a firm of solicitors to represent him, and she did. Ma signed a retainer agreement with this firm on May 29, 1985, a little more than two months after the commencement of the bankruptcy case. Ma's affidavit recites these facts; Ma says that in 1985 he was "not aware of the seriousness of the bankruptcy proceedings", but this is a far cry from saying that

he was not aware of the proceedings. Hong Kong had an unimpeachable claim to adjudicate Ma a bankrupt and administer his estate: Ma resided in Hong Kong and left substantial assets behind when he fled using travel documents issued by the Crown Colony; the judgment against him was entered by a Hong Kong court that unquestionably had personal and subject-matter jurisdiction. A district judge acting on a petition under §304 would not try to determine technical questions of service, given Ma's knowledge and the conceded substantive power of the foreign court to adjudicate the claims.

So if the receiver had filed a proceeding under §304 in 1985, he would have been entitled to the money. Indeed he might well have had it by default, for Ma does not allege in the complaint that either the receiver or the Bank knew his whereabouts in June and July of 1985. He had not changed the Hong Kong address on file with the Bank. When asked at oral argument, counsel for Ma replied that he did not know whether any communication from receiver or Bank could have reached Ma—unless perhaps they had mailed something to his home address in Hong Kong! Notice by publication in Chicago would hardly have helped Ma, and we do not believe that an ancillary proceeding under §304 may be forever stalled by inability to track down the debtor, for the regular use of that section concerns debtors living outside the United States.

Banks rationally may insist that persons claiming to be foreign receivers file actions under §304. If the receiver had been an impostor, or if the funds had been diverted somewhere between Continental and the receiver, then the absence of an order under §304(b)(2) would have left the Bank on the hook. See *Restatement* §321. But the receiver turned out to be genuine, and the estate received the money. So far as Ma is concerned, the only difference between the informal procedure the Bank used and a formal proceeding under §304 was the lack of an opportunity to wage a collateral attack on the receiver's appointment. As such an opportunity would have been worthless to Ma

and would only have raised the costs of administering the estate, the procedures the Bank followed did not cause Ma any loss.

AFFIRMED

CUDAHY, *Circuit Judge*, concurring in part and dissenting in part:

The majority has taken its "horse" over the jumps here with the abandon of a true steeplechaser. Somehow it has managed to slip by what seems to me the real stone wall on the course. The Bank is, of course, located in Illinois, and the deposit contract was made explicitly subject to Illinois and federal law. There is absolutely no legal basis for the Bank to release funds at the request of a foreign receiver unless and until a petition has been filed under 11 U.S.C. section 304 to authorize ancillary proceedings in Illinois. At that point, a judge in Illinois may direct the surrender of the funds. That this might have cost the estate something is certainly not a good reason for waiving the requirement. To allow banks willy-nilly to ship their depositors' funds on demand to foreign receivers in the hope that the requests will subsequently prove legitimate seems to me very bad policy indeed.

The majority attempts to gallop around the fundamental barrier here by confidently asserting that, had the receiver made an application to the district court pursuant to section 304, the Hong Kong receiver's credentials would certainly have been accepted despite the service defect. Alternatively, as the majority notes, Ma may lack standing to sue because of the settlement with the judgment creditors. There may be substantial merit to these points, but they do not seem to me to legimate retroactively the unauthorized release of the funds by the Bank.

I therefore respectfully dissent to the extent indicated.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

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UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION

Name of Assigned
Judge or Magistrate WILLIAM T. HART

Case Number 88 C 7827

Date August 3, 1989

Case Title MICHAEL MA v. CONTINENTAL Ill. NAT'L BK. & TRUST CO., etc.

(1) X Judgment is entered as follows:

Pursuant to Memorandum Opinion and Order, IT IS ORDERED that:
(1) Defendant's motion for summary judgment is granted.
(2) Plaintiff's motion for summary judgment is denied.
(3) The Clerk of the Court is directed to dismiss the case with prejudice and enter judgment in favor of defendant.

DOCKETED AUG 07 1989

X (For further detail see XX order attached to the original minute order form.)

XX Notices mailed by judge's staff.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MICHAEL MA,

Plaintiff,

v.

No. 88 C 7827

CONTINENTAL ILLINOIS
NATIONAL BANK & TRUST
COMPANY OF CHICAGO,
a national banking corporation,

Defendant.

MEMORANDUM OPINION AND ORDER[1]

Before the court are cross-motions for summary judgment. For the reasons indicated below, defendant's motion is granted and plaintiff's motion is denied.

December, 1984, plaintiff Michael Ma ("Ma") opened a money-market account with defendant Continental Illinois National Bank & Trust Company ("Continental"). In July, 1985, Continental, without authority from Ma, transferred the money in the account to an official bankruptcy trustee in Hong Kong. The request for the transfer was made by Continental Illinois Bank Limited ("Limited"), a wholly owned subsidiary of Continental located in Hong Kong. In April, 1985, an *ex parte* bankruptcy order was entered against Ma in a Hong Kong court. Two years later, the Hong Kong court dismissed the action for want of personal jurisdication over Ma. Ma subsequently settled the creditor's judgment, whereupon the trustee released the remaining funds to him.

In September, 1988, Ma filed a four-count complaint against Continental for reimbursement of the monies Continental transferred to the trustee. On Ma's motion, the court dismissed

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[1] This court's January 9, 1989 order is corrected *nunc pro tunc* to state that defendant's motion to dismiss Court III is granted and Court III is dismissed without prejudice.

Counts Two and Four and granted defendant's motion to dismiss Count Three. Plaintiff's Count One, alleging breach of contract, is all that remains of this case. Jurisdiction is based on diversity and Illinois law applies.[2]

"[W]hen money is deposited in a bank, a debtor-creditor relationship exists between the bank and the depositor, and the rules governing their relationship are determined by the contract which exists between them." *Susen v. Citizens Bank & Trust Co.*, 111 Ill. App. 3d 786, 444 N.E.2d 701, 704 (1st Dist. 1982) (quoting from *Menicocci v. Archer National Bank of Chicago*, 67 Ill. App. 3d 388, 391, 385 N.E.2d 63 (1st Dist. 1978)). Assuming Continental breached its contract with Ma, he must still plead the necessary elements for a valid breach of contract action. *Allstate Insurance Co. v. Winnebago County Fair Association, Inc.*, 131 Ill. App. 3d 225, 475 N.E.2d 230, 236 (2d Dist. 1985). Because Ma cannot prove any damages, an essential element of a breach of contract claim, his complaint must fail.

In Illinois, a damage award for breach of contract should place the aggrieved party in the place he would have held had the breach not occurred. *Chicago Painters And Decorators Pension, Health And Welfare, And Deferred Savings Plan Trust Funds v. Karr Brothers, Inc.*, 755 F.2d 1285, 1290 (7th Cir. 1985). Anything more would be a windfall, not recoverable under Illinois law. *Kohlmeier v. Shelter Insurance co.*, 170 Ill. App. 3d 643, 525 N.E.2d 94, 102 (5th Dist. 1988); *First National Bank of Elgin v. Dusold*, 536 N.E.2d 100, 103 (2d Dist. 1989); *Feldstein v. Guinan*, 148 Ill. App. 3d 610, 499 N.E.2d 535, 537 (1st Dist. 1986). These principles prove dispositive of Ma's claim: after the bankruptcy proceeding ended, Ma received his money from the Hong Kong trustee – including the money from his account with Continental. Therefore, any award against Continental would amount to a windfall, placing Ma in a better position than if the alleged breach had never occurred. Ma does not allege any injury arising out of the lost opportunity costs (i.e. money he would have made had he been allowed access to the funds in the account). In any event, such damages cannot be reasonably calculated, and

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[2] Because the parties have treated Illinois law as the governing law in this case, no examination of choice-of-law principles is necessary. *Eggert v. Weisz*, 839 F.2d 1261, 1263 n.1 (7th Cir. 1988)

therefore are not recoverable. *First National,* 536 N.E.2d at 103; *Briarcliffe West Townhouse Onwers Assoc. v. Wiseman Construction Co.,* 107 Ill. App. 3d 402, 480 N.E.2d 833, 839 (2d Dist. 1985). *See also Cincinnati Fluid Power, Inc. v. Rexnord, Inc.,* 797 F.2d 1386, 1393 (6th Cir. 1986). Nor does he ask for lost interest payments. In short, all Ma wants is what he got. He has no claim for more.

IT IS THEREFORE ORDERED that:

(1) Defendant's motion for summary judgment is granted.

(2) Plaintiff's motion for summary judgment is denied.

(3) The Clerk of the Court is directed to dismiss the case with prejudice and enter judgment in favor of defendant.

ENTER:

/s/ WILLIAM T. HART

UNITED STATES DISTRICT JUDGE

Dated: AUGUST 3, 1989

**UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION**

Case Number 88 C 7827
Date August 16, 1989

Name of Assigned
Judge or Magistrate WILLIAM T. HART

Case Title Michael Ma v. Continental Illinois National Bank & Trust

MOTION: Plaintiff
Motion for Reconsideration

(1) X (Other docket entry;)

Plaintiff's motion for reconsideration is denied. The affidavit and facts referred to by plaintiff were previously taken into consideration.

X Docketing to mail notices.

AUG 18 1989

Docket #
50

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

JUDGMENT — WITH ORAL ARGUMENT

Date: June 21, 1990

BEFORE: **Honorable** Richard D. Cudahy, Circuit Judge
Honorable Frank H. Easterbrook, Circuit Judge
Honorable Joseph T. Sneed, Senior Circuit Judge*

No. 89-2844

MICHAEL MA,
Plaintiff-Appellant

v.

CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO, a national banking corporation,
Defendant-Appellee

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
No. 88 C 7827, Judge William T. Hart

This cause was heard on the record from the above mentioned district court, and was argued by counsel.

On consideration whereof, **IT IS ORDERED AND ADJUDGED** by this Court that the judgment of the District Court in this cause appealed from be, and the same is hereby, AFFIRMED with costs, in accordance with the opinion of this Court filed this date.

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* Hon. Joseph T. Sneed, Senior Circuit Judge of the Ninth Circuit, is sitting by designation.

Supreme Court, U.S.
FILED
OCT 3 1990
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 90-511

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

MICHAEL MA,

Petitioner,

vs.

CONTINENTAL ILLINOIS NATIONAL BANK & TRUST COMPANY,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

STEPHEN NOVACK
(Counsel of Record)
BRUCE BRAVERMAN
NOVACK AND MACEY
303 West Madison Street
Suite 1500
Chicago, Illinois 60606
(312) 419-6900

Attorneys for Respondent
CONTINENTAL BANK N.A.

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

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TABLE OF CONTENTS

APPENDIX

TABLE OF AUTHORITIES

No. 90-511

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

MICHAEL MA,

Petitioner,

vs.

CONTINENTAL ILLINOIS NATIONAL BANK & TRUST COMPANY,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

STATEMENT OF THE CASE

A. Overview

The Petition argues that this lawsuit raises fundamental Constitutional issues and that the opinion below will have a devastating national impact. It is difficult to imagine more serious "misstatements" concerning this action. Indeed, this Petition is a prime example of why this Court

changed its rule to encourage responses to certiorari petitions to correct "misstatements of fact or law" before the Court rules on such petitions. *See* Sup. Ct. R. 15.1.

Contrary to what the Petition says, this action involves only a state law breach of contract claim between a bank and a depositor over the handling of funds in a money market account. *No* Constitutional issue is presented. Indeed, any such "due process" issue was long-ago waived by the Petitioner. A Constitutional due process claim was once raised in this case, as Count IV of the Complaint. (App. 5-6.) But that claim was so deficient that, after the Respondent filed its motion to dismiss that count (because of the absence of "state action"), Petitioner voluntarily dismissed the "due process" count. (App. 7.) The due process count was never re-asserted in the district court and, further, no Constitutional issue was raised on appeal before the Seventh Circuit.

Moreover, *no* federal issue—much less an important federal issue—is presented by the pleadings. Accordingly, in ruling on the breach of contract claim, the courts below merely applied state law principles of causation and damages.

In short, the Petition sets forth precisely what is *not* involved here, *i.e.*, any issue of Constitutional or federal law meriting this Court's attention. What *is* involved—an isolated state law contract claim lacking any merit or equity—is explained more fully below.

B. Underlying Facts

As of December 6, 1984, the Petitioner, Michael Ma ("Ma"), then a resident of Hong Kong, had certain funds in an account in Hong Kong at Continental Illinois Bank Limited (the "Bank's Subsidiary"). The Bank's Subsidiary

was then, and still is, wholly-owned by Respondent Continental Bank N.A., formerly known as Continental Illinois National Bank & Trust Company of Chicago (the "Bank").[1]

On December 6, 1984, a judgment for an amount that was subsequently determined to be in excess of $35 million (Hong Kong), or about $4.5 million (U.S.), was entered in Hong Kong against Ma and in favor of Fong Ming (the "Petitioning Creditor"). On that same day, Ma transferred his funds from the Bank's Subsidiary in Hong Kong to the Bank in Chicago to open the account at issue herein (the "Account"). At that time, Ma represented to the Bank that he was a Hong Kong resident, and all papers regarding the opening of the Account were prepared and executed in Hong Kong.

As found by a Hong Kong court, on December 8, 1984, only two days after the judgment was rendered against him and after transferring his funds from Hong Kong to Chicago, Ma "fled Hong Kong with some 30 cardboard boxes of his worldly possessions," leaving the judgment unsatisfied. *Ex parte Fong Sze Ming*, 1987 No. 77, at 2 (H.K. Ct. App. Dec. 21, 1987). Ma's daughter continued to live at his Hong Kong residence.

On March 14, 1985, the Petitioning Creditor filed an involuntary bankruptcy proceeding against Ma in Hong Kong (the "Bankruptcy"). Process was mailed to Ma's Hong Kong residence. Ma's daughter thereafter advised Ma of the Bankruptcy, and by May 1985, Ma had retained

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[1] The Bank's Subsidiary is actually a wholly-owned subsidiary of a wholly-owned subsidiary of the Bank.

Pursuant to Supreme Court Rule 29.1, the parent company of the Bank is Continental Bank Corporation. The Bank has no direct subsidiaries which are not wholly-owned by the Bank.

Hong Kong counsel to represent him in "all proceedings and matters in relation to" his Bankruptcy. *Id.* at 5. Thus, Ma had notice of the Bankruptcy soon after it was filed and well before the transfer of funds at issue took place.[2]

On April 1, 1985, the Hong Kong Official Receiver was appointed Receiver of the Bankruptcy estate and, on May 15, 1985, Ma was adjudicated a bankrupt. The Official Receiver was, thus, Ma's bankruptcy trustee and served as such at all times relevant hereto.

On or about June 12, 1985, the Bank was notified by the Bank's Subsidiary that Ma's Bankruptcy had been filed, and that the Official Receiver had requested copies of the statements of the Account. Thereafter, the Official Receiver communicated to the Bank's Subsidiary his intent to collect the funds remaining in the Account. On or about June 27, 1985, the Bank's Subsidiary, based on advice of counsel, had the Bank transfer the balance in the Account to the Official Receiver. In order to effect such transfer at no charge to Ma, the Bank transferred the funds to the Bank's Subsidiary for transmission to the Official Receiver. The Bank used its Subsidiary merely as a conduit to effect the transfer to the Official Receiver. The transfer was completed, and the Official Receiver received the funds, on or about July 9, 1985.

Ma learned or should have learned of the transfer no later than November 12, 1985. On that day, the Zurich, Switzerland branch of Chemical Bank requested on be-

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[2] Ma's claim in his Petition (at 3) that he "never received notice of the involuntary bankruptcy proceeding" is directly contradicted by the May 24, 1989 Affidavit he filed as an exhibit to his Reply Memorandum In Support of His Cross-Motion for Summary Judgment. In that Affidavit, Ma admitted that his daughter advised him of the Bankruptcy in late May 1985 and that he promptly retained lawyers to represent him in the Bankruptcy.

half of Ma that the balance of the Account be transferred to an account at Chemical Bank's New York office. As Ma's Account had been closed in July, no funds were transferred.

Notwithstanding that Ma retained bankruptcy counsel as early as May 1985, and that Ma learned or should have learned of the Bank's now-challenged transfer of funds by November 1985, Ma did not present his motion to set aside the Bankruptcy until almost two years later—on March 31, 1987. On December 11, 1987—over two years after the Bank transferred the funds to the Official Receiver—a Hong Kong court dismissed the Bankruptcy based on its finding that Ma had not been technically "served" with notice of the Bankruptcy. The Petitioning Creditor appealed from that order.

During the pendency of the Petitioning Creditor's appeal, Ma and the Petitioning Creditor entered into a settlement of the Bankruptcy and the $35 million (H.K.) December 6, 1984 judgment which precipitated it. Pursuant thereto:

- The right to the funds collected by the Official Receiver in connection with the Bankruptcy (including the funds from the Account) net of the Official Receiver's fees and expenses was transferred by Ma to the Petitioning Creditor;
- Ma provided other consideration to the Petitioning Creditor, including payment of $9.1 million (Hong Kong); and
- The Petitioning Creditor dismissed his appeal from the December 11, 1987 order dismissing the Bankruptcy.

Thereafter, Ma brought this action.

C. Rulings Of The District Court

Ma filed this action in September 1988. In his Complaint, Ma purported to assert claims for breach of con-

tract (Count I), conversion (Count II), negligence (Count III) and violation of his Constitutional due process rights (Count IV), based on the Bank's transfer of the funds in the Account to the Official Receiver. (App. 1-6.)

The Bank moved to dismiss Counts II through IV and filed an answer and affirmative defenses with respect to Count I. In response, Ma moved to voluntarily dismiss his due process and conversion counts, and he defended the negligence count. On December 16, 1988, the district court granted Ma's voluntary dismissal motion and dismissed the "due process" and conversion claims. (App. 7.) On January 9, 1989, the district court also granted the Bank's motion to dismiss the negligence count, leaving only the breach of contract claim in Count I.

On February 27, 1989, the Bank moved to dismiss or for summary judgment on Ma's breach of contract claim. Thereafter, Ma cross-moved for summary judgment. On August 3, 1989, the district court granted the Bank's motion, denied Ma's cross-motion and entered judgment in favor of the Bank on Count I. (Petition, App. 9a-12a.) The district court held that, even assuming *arguendo* that the Bank breached its contract with Ma (which issue was not decided), Ma suffered no damages as a result thereof. (*Id.* at 11a-12a.) The court accordingly did not reach the issue of whether the Bank was entitled to transfer the funds to Ma's Official Receiver. Subsequently, on August 16, 1989, Ma's motion for reconsideration was also denied. (*Id.* at 13a.)

Ma appealed from the August 3 and 16, 1989 orders.[3]

[3] No appeal was taken from the December 16, 1988 order allowing the voluntary dismissal of the due process and conversion claims. Also, no appeal was taken from the January 9, 1989 order dismissing the negligence count. Thus, the appeal which was filed concerned only the state law breach of contract claim.

D. The Court Of Appeals' Decision

On June 21, 1990, the Court of Appeals for the Seventh Circuit affirmed the district's court's ruling with respect to Ma's breach of contract claim. 905 F.2d 1073. Like the district court, the Court of Appeals did not reach the issue of whether the Bank had breached the deposit contract. Rather, it based its ruling on state law causation principles and held that the Bank's transfer did not cause Ma's loss.[4]

REASONS FOR DENYING THE PETITION

I.

THIS ACTION PRESENTS NO CONSTITUTIONAL DUE PROCESS OR OTHER IMPORTANT "FEDERAL" ISSUE

A. Ma Waived His "Due Process" Claim, Which, In Any Event, Is Meritless

The gravamen of Ma's Petition before this Court is that his "due process" rights were violated. First, he argues that his due process right to adequate notice was violated in the Hong Kong Bankruptcy and that he should have been given an opportunity in the United States to challenge his Hong Kong Bankruptcy. (Petition 7-10.) Then, he argues that the July 1985 transfer of the funds by the

[4] As a result of the holdings of the Court of Appeals and the district court, there is no ruling to review regarding the "propriety" of the Bank's transfer of the funds. At most, this Court could review only the state law causation issue and, if it found that issue to be wrongly decided, remand for the courts below to address the legality of the transfer itself.

Bank "patently offends traditional concepts of due process" because he was not given an opportunity to contest such transfer in the United States by again contesting the legality of the Bankruptcy. (*Id.* at 11.) Both arguments are, at bottom, virtually identical due process theories. Neither is properly before this Court.

The due process theory set forth in the Petition is precisely the one which Ma waived in the district court nearly two years ago! In Count IV of his Complaint, Ma asserted that his "due process rights have been denied" as a result of the Bank's action. (Complaint, Count IV, ¶12; App. 5-6.) The Count was titled "Due Process." (App. 5.) But, after the Bank moved to dismiss that "due process" claim on the ground that no state action was involved, Ma promptly moved to voluntarily dismiss the count. On December 16 , 1988, the district court granted Ma's request, holding that Ma could not thereafter raise the due process claim "without leave of court upon properly noticed motion." (Order of district court, dated December 16, 1988; App. 7.)

Ma never sought leave of the district court to re-raise his "due process" claim. Nor did Ma attempt to raise this "Constitutional" claim in the Court of Appeals. Since December 16, 1988, the "due process" claim simply has not been part of this case. It is beyond dispute that, where a theory is not raised (or is abandoned) in the district court, it is waived and cannot be raised for the first time on appeal. *See, e.g., Board of Directors of Rotary International v. Rotary Club*, 481 U.S. 537, 549-50 (1987); *Gray v. Lacke*, 885 F.2d 399, 409 (7th Cir. 1989), *cert. denied*, 110 S. Ct. 1476 (1990). For this reason alone, the Petition should be denied.

But there is more. Again, the basis of the Bank's initial motion to dismiss the due process count was that the

Complaint contained no allegations that either the federal government or a state government was an actor in the alleged violation. Accordingly, Ma's due process claim was fatally flawed. *See Rendell-Baker v. Kohn*, 457 U.S. 830, 837-38 (1982) ("state action" required for 14th amendment claim); *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*, 483 U.S. 522, 542-44 (1987) (same for 5th amendment claim). Indeed, Ma admits in the present Petition that there was no state action here. (Petition 11.) Because there is no such state action, Ma's Constitutional due process arguments are baseless.[5]

B. No Important Federal Issue Is Presented By This Case

Further, the only federal issue Ma purports to raise is extremely limited in scope and lacks any national import. Neither court below reached the issue of whether Section 304 of the Bankruptcy Code imposed on the Bank a duty to require the Official Receiver to file an ancillary proceeding thereunder. At most, Section 304 arose in the Court of Appeals as a tangential matter. That court, responding to Ma's arguments, spoke to Section 304 only in the context of showing that the Bank's transfer was not a cause of Ma's "loss" because the same result would

[5] Indeed, Ma's assertion of an obviously flawed due process issue, coupled with the omission from his Petition of the fact that he previously voluntarily dismissed his due process claim, is so egregious and so pervasively undercuts the basis of his Petition, that the Bank respectfully submits that it is appropriate to grant attorneys' fees to the Bank to compensate it for the cost of the instant Response or, alternatively, to remand the case to the courts below for the purpose of awarding such fees and costs. *See* 28 U.S.C. §1927 (sanctions authorized against attorney who "so multiplies the proceedings in any case unreasonably and vexatiously"); *see also* Fed. R. Civ. P. 11.

have been reached had a Section 304 proceeding been filed. *Ma*, 905 F.2d at 1075-77.

Further, to the extent the Section 304 issue is present here at all, there is no question that this "federal" issue is not one which this Court should address. Ma has not pointed to any split of authority on the issue, much less to a suggestion by courts that the issue is a difficult or confusing one. And, given the paucity of any authority on the issue and the infrequency with which it arises (if at all), resolution of the merits of the issue could hardly have a wide impact on society. In sum, stripping the Petition of its rhetoric, this case presents no important or otherwise pressing federal issue.

* * *

When the Constitutional claim is dismissed as the red-herring it is, and the "federal" issue seen for what it is, all that is left is a state law breach of contract issue. Even with respect to this issue, there is no split of authority or overriding national interest implicated. The Bank believes, and respectfully suggests, that the state law contract issue offered does not merit this Court's attention. *See* Sup. Ct. R. 10.

II.

THE SOLE ISSUED RAISED—WHETHER THE BANK'S TRANSFER CAUSED MA'S "LOSS"—WAS PROPERLY DECIDED BY THE COURTS BELOW

As shown above, there is no Constitutional or federal issue for this Court to decide. Nor is there any nationally important or disputed state law issue. Moreover, the state law issues were correctly decided by the courts below. This is because the Bank's conduct in transferring the funds was not the *cause* of any harm which Ma may have suffered. Rather:

- Any damage was the result of Ma's long and deliberate inaction; and
- Had the Bank required the Official Receiver to file a Section 304 proceeding (which procedure Section 304 does not require), the bankruptcy court would have enforced the Hong Kong Bankruptcy proceedings and required the turnover of the funds to the Official Receiver.

A. Ma's "Loss" Resulted Not From The Bank's Conduct, But From Ma's Inaction

Because this is a diversity action involving an Illinois bank account, Illinois law governs Ma's breach of contract claim.[6] Illinois law is firmly established that a plaintiff may not recover for damages unless they were proximately caused by the alleged breach of contract. The Seventh Circuit, applying Illinois law, has confirmed that:

> [A] bank will not be held liable [for depositor's losses] "unless there is a clear causal relationship between the bank's actions and the plaintiff's loss."

Appliance Buyers Credit Corp. v. Prospect National Bank, 708 F.2d 290, 294 (7th Cir. 1983) (citation omitted); *accord Klucznik v. Nikitopoulos*, 152 Ill. App. 3d 323, 503 N.E.2d 1147, 1152 (2d Dist. 1987); *Feldstein v. Guinan*, 148 Ill. App. 3d 610, 613, 499 N.E.2d 535, 537 (1st Dist. 1986) ("Speculative damages or damages not the proximate result of the breach will not be allowed").

Here, any "loss" suffered by Ma was not proximately caused by the Bank's conduct. The only Bank conduct chal-

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[6] As the district court noted in its August 3, 1989 opinion, both "parties have treated Illinois law as the governing law in this case." (Petition, App. 11a n.2.)

lenged by Ma is this: the Bank transferred Ma's funds to Ma's Bankruptcy trustee—the Official Receiver. Yet, as of that point, Ma had suffered no loss at all. The money still constituted part of his assets. The only difference was that, because Ma was in bankruptcy, these (and all other of his) assets were then being held by the Official Receiver. To prove the point in its simplest terms—had the Bankruptcy been dismissed immediately after the Official Receiver received the funds from the Account and had Ma then obtained the money from the Official Receiver, there would have been no "damage" to Ma. Thus, any damage later occurring (if any) could not have been caused by the Bank.

Indeed, whatever caused Ma's alleged loss happened *after* the transfer, that is, after the Bank's involvement totally and completely ceased. This is what happened after the Bank's July 1985 transfer:

- With full knowledge that the funds from the Account were being held and were subject to being spent by the Official Receiver, Ma sat back and did nothing for almost two years;
- Ma made no challenge to the Bankruptcy until March 31, 1987, almost two years after retaining counsel;
- In the meantime, as Ma was well aware, the Official Receiver diligently pursued its task of collecting assets which made up Ma's Bankruptcy estate and incurred expenses in connection therewith;
- Ma then agreed to allow all remaining funds held by the Official Receiver to be paid to the Petitioning Creditor as part of the settlement which discharged Ma's judgment debt to that Creditor; and
- Ma filed no proceedings to recover the funds at issue until the district court action was filed in Sep-

> tember 1988, after the Bankruptcy had been settled and after he had ultimately given up any right to the funds at issue to his Petitioning Creditor.

Thus, for two separate reasons, any supposed "loss" was not caused by the Bank's transfer. First, if Ma is correct that the Bankruptcy was invalid because of the type of service made, then all he had to do to put a halt to the Bankruptcy (and obtain possession of the transferred funds) was to file a motion to dismiss. And Ma should have filed this motion promptly after learning of the Bankruptcy to avoid any expenses and costs of the Official Receiver being taxed against the Bankruptcy estate. However, *Ma* chose not to challenge the Bankruptcy promptly; instead he waited nearly two years to do so. As a result of Ma's non-action, he lost his opportunity to stop the Bankruptcy before or soon after the funds from the Account were transferred and before the Official Receiver had spent substantial sums collecting Ma's assets.

Moreover, Ma's ultimate parting with these funds was caused not by anything the Bank did, but by Ma's own voluntary act in settling with the Petitioning Creditor. By voluntarily transferring the right to the Account funds, Ma gave up any hope of recovering them for himself from the Official Receiver. Thus, it was not the Bank's transfer of the funds to the Official Receiver that caused Ma to lose the money; it was Ma's use of these funds to discharge his debt to the Petitioning Creditor that resulted in such "loss."

Plainly, Ma's voluntary delay and his voluntary settlement were, in effect, intervening or superceding causes of the alleged "loss." For these reasons, the Bank's transfer of the funds did not "cause" Ma's alleged loss.

B. The Result Is No Different Under Section 304 Of The Bankruptcy Code

Even were the Court to ignore the impact of Ma's deliberate and lengthy inaction, application of Section 304 of the Bankruptcy Code to the facts of this case does not alter the result. That is because Section 304 presents an optional, not mandatory procedure, and because, even had a Section 304 proceeding been filed, the funds would nonetheless have been obtained by the Official Receiver.

1. Federal Law Does Not Require Banks To Hold Deposits Until A Foreign Representative Initiates A Section 304 Proceeding

Ma's contention (at p.7 of his Petition) that the Bank "was clearly obligated to require the Hong Kong Official Receiver to initiate an 'ancillary proceeding' [under Section 304] with a bankruptcy court in Illinois before it transferred Ma's funds" to the Official Receiver is unsupported by any federal law. The language of Section 304 addresses an *option*, and then one which is available only to a "foreign representative," not to entities or financial institutions holding assets of the bankrupt debtor. *See* 11 U.S.C. §304; Petition at 2-3. The Bank knows of no statute or opinion—and Ma has cited to none—which requires *banks* or other financial institutions to refuse to transfer assets to foreign representatives absent the filing of a Section 304 proceeding.[7]

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[7] The courts below did not reach this issue. Moreover, *RBS Fabrics Ltd. v. G. Beckers & Le Hanne*, 24 Bankr. 198 (S.D.N.Y. 1982), cited by Ma, did not address this issue. The issue there was whether a claim of a United States creditor of a foreign debtor should be resolved in the United States or in Germany where bankruptcy proceedings against the debtor were pending. The court held merely that it was preferable that such choice of forum issue be resolved by a bankruptcy court in a Section 304 proceeding than by the district court in an attachment action.

Further, Section 304 does not even impose a requirement on the foreign representative to file a proceeding thereunder. The statute contains no language making such filing "compulsory," and both the pertinent House and Senate Reports state only that a foreign representative in a foreign bankruptcy case "*may* file a petition under this section." H. Rep. No. 595, 95th Cong., 2d Sess. 324-25, *reprinted in* 1978 U.S. Code Cong. & Ad. News 5963, 6281; S. Rep. No. 989, 95th Cong., 2d Sess. 35, *reprinted in* 1978 U.S. Code Cong. & Ad. News, 5787, 5821. Thus, Section 304 does not mandate that its procedure is the only one available to the foreign representative. *In re Enercons Virginia, Inc.*, 812 F.2d 1469, 1472 (4th Cir. 1987); *Cunard Steamship Co. v. Salen Reefer Services AB*, 773 F.2d 452, 455-56 (2d Cir. 1985). *A fortiori*, the Bank could not be bound to have required the Hong Kong Official Receiver to have filed a Section 304 proceeding.

2. Even If A Section 304 Proceeding Had Been Filed, The Funds In The Account Would Have Been Transferred To The Official Receiver

As shown above, Ma's failure to act in a timely fashion—not the Bank's transfer of the funds—caused his "damage." But Ma says that he should have been given the opportunity in the United States (as well as in Hong Kong) to contest the Bankruptcy by having the Bank require the Official Receiver to file a Section 304 proceeding to obtain the funds. While, as already discussed, the Bank disagrees with this assertion, even under Ma's preferred procedure the result would have been no different.

In a Section 304 proceeding, a debtor's right to collaterally attack the foreign bankruptcy proceedings is very limited. Generally, such proceedings are enforced unless

the enforcement would prejudice the rights of United States citizens or violate domestic public policy, or the foreign tribunal lacked jurisdiction. *Victrix Steamship Co., S.A. v. Salen Dry Cargo A.B.*, 825 F.2d 709, 713-14 (2d Cir. 1987). Ma does not argue (and has never argued) that the Hong Kong procedures—adopted directly from the British model on which our bankruptcy laws were based—did not provide sufficient procedural safeguards or otherwise violated domestic public policy.[8] Ma himself took advantage of these safeguards, albeit belatedly, in challenging the Bankruptcy two years after it was filed. And, there can be no claim that enforcement of the proceedings prejudiced rights of United States citizens as Ma apparently had no United States creditors. Ma is thus left with his jurisdictional argument.

Ma's jurisdictional attack on the Hong Kong proceedings is apparently based solely on his claim that he was not properly served with notice of the Bankruptcy.[9] Yet, for

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[8] Indeed, United States courts have frequently given effect to the bankruptcy laws of Hong Kong and other British colonies. *In re Axona Intl Credit & Commerce Ltd.*, 88 Bankr. 597, 610-11 (Bankr. S.D.N.Y. 1988) ("Hong Kong [bankruptcy] law is not repugnant to our ideas of justice, and is inherently fair and regular"); *In re Lines*, 81 Bankr. 267, 269-70, 273 (Bankr. S.D.N.Y. 1988) (Bermuda proceeding); *In re Gee*, 53 Bankr. 891, 901-04 (Bankr. S.D.N.Y. 1985) (Cayman Island proceeding); *In re Culmer*, 25 Bankr. 621, 629-32 (Bankr. S.D.N.Y. 1982) (Bahamian proceeding).

[9] It must be remembered that Ma's claim that he was not properly "served" with notice of the Bankruptcy in 1985 was based on a technicality. Ma in fact received actual notice of the Bankruptcy, as shown by his May 1985 retention of counsel with respect to the Bankruptcy. Further, notice of the Bankruptcy was sent to Ma's Hong Kong residence where his daughter continued to reside and where at least one letter was sent by the Bank to Ma and admittedly received by him. Such address was the only one known to the authorities because, during such period, Ma was "in flight"

(Footnote continued on following page)

the notice to have been sufficient to enforce the Bankruptcy under principles of comity, it need only have been the "bare minimum" notice required by the Constitution.[10] *Ma*, 905 F.2d at 1076, *citing Hilton v. Guyot*, 159 U.S. 113, 202-03 (1895). The facts with respect to the "notice" issue are undisputed:

- Notice of the filing of the Bankruptcy was sent to Ma's residence in Hong Kong, the residence from which Ma had clandestinely fled only months before;
- Ma's daughter, who had continued to live in his Hong Kong residence after Ma's departure, received notice of the Bankruptcy, and thereafter contacted Ma and advised him of the Bankruptcy; and
- By the end of May 1985, Ma had retained solicitors to represent him in the Bankruptcy.[11]

Where, as here, the process employed was reasonably calculated to produce notice, the minimum Constitutional notice requirements necessary to the enforcement of a foreign judgment have been satisfied. *See, e.g., Virginia Lime Co. v. Craigsville Distributing Co.*, 670 F.2d 1366

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[9] *continued*

in an attempt to evade the judgment against him. Moreover, contrary to Ma's suggestion (Petition at 5 & 9), the Hong Kong courts did not even finally resolve the technical "service" issue. Rather, an appeal of the Hong Kong court's December 11, 1987, ruling on the issue was pending when Ma entered into the settlement which resulted in the dismissal of such appeal and the Bankruptcy.

[10] There is, and can be, no question that Ma, a long-time resident of Hong Kong, had sufficient "minimum contacts" with Hong Kong to justify its assertion of jurisdiction over him assuming sufficient service.

[11] It should be noted that the transfer of the funds at issue did not occur until *July* 1985, more than one month after Ma had retained counsel to represent him in the Bankruptcy.

(4th Cir. 1982) (mail to last known address is constitutionally sufficient); *Stateside Machinery Co. v. Alperin*, 591 F.2d 234, 241-42 (3d Cir. 1979) (same). Such notice requirements are plainly met where, as here, notice was in fact sent to Ma's last known address, *i.e.*, the only place he could have been reached given his flight.

Accordingly, any attack by Ma in a Section 304 proceeding on the enforceability of the Hong Kong Bankruptcy proceedings would have failed. Instead, the bankruptcy court would have enforced the Hong Kong Bankruptcy, and the Bank would have been ordered to transfer the funds in the Account to the Official Receiver, whom even Ma concedes was otherwise his properly-appointed bankruptcy trustee. As the Court of Appeals concluded:

> So far as Ma is concerned, the only difference between the informal procedure the Bank used and a formal proceeding under §304 was the lack of an opportunity to wage a collateral attack on the Receiver's appointment. As such an opportunity would have been worthless to Ma and would only have raised the cost of administering the estate, *the procedures the Bank followed did not cause Ma any loss.*

905 F.2d at 1077 (emphasis added).

* * *

In sum, there was no "clear causal relationship" between the transfer by the Bank and Ma's alleged "loss." *Appliance Buyers Credit Corp.*, 708 F.2d at 294. The acts (and omissions) which caused the loss, if any, were those of Ma. Having incurred a huge obligation, attempted to run away therefrom, and, finally, having settled *his* underlying debt at his own pace, Ma tried to grasp on to a technicality and have the Bank reimburse him for part of his debt. Such a result would be an unconscionable windfall for Ma. Ma's desperate and continuing attempt to obtain such a windfall should now be put to rest.

CONCLUSION

For the foregoing reasons, this Court should deny Ma's Petition.

Respectfully submitted,

STEPHEN NOVACK
(Counsel of Record)
BRUCE BRAVERMAN
NOVACK AND MACEY
303 West Madison Street
Suite 1500
Chicago, Illinois 60606
(312) 419-6900

Attorneys for Respondent
CONTINENTAL BANK N.A.

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MICHAEL MA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No.
	)	
CONTINENTAL ILLINOIS NATIONAL BANK & TRUST COMPANY OF CHICAGO, a national banking corporation,	)	JURY DEMANDED
	)	
Defendant.	)	

COMPLAINT

Plaintiff, MICHAEL MA, by his attorneys, Eugene J. Kelley, Jr. and Hal R. Morris (Arnstein, Gluck, Lehr & Milligan, Of Counsel), complains of defendant, CONTINENTAL ILLINOIS NATIONAL BANK & TRUST COMPANY OF CHICAGO, a national banking corporation, as follows:

COUNT I

1. Plaintiff, Michael Ma, is an individual who is a resident of the country of Switzerland.

2. Defendant is a banking corporation duly organized national bank, and has its principal place of business in Chicago, Illinois. At all times relevant, defendant was authorized to conduct and was conducting business in the State of Illinois.

3. The amount in controversy exceeds, exclusive of interests and costs, the sum of Ten Thousand Dollars ($10,000).

4. Jurisdiction is based upon diversity of citizenship in the requisite jurisdictional amount.

5. On or about December 6, 1984, plaintiff established and opened a money market account, Account No. 00-9483003, with defendant.

6. Upon the establishment and opening of the money market account, defendant became bound by an implied contract under which it was to hold all deposits or other funds in the subject account to be disbursed only in conformity with plaintiff's instructions.

7. Subsequent to the opening of the subject account, plaintiff made numerous deposits and withdrawals.

8. As of July 1, 1985, the balance in said account was $157,432.37.

9. On July 1, 1985, defendant withdrew or caused to be withdrawn all of the funds on deposit in the subject account. Said withdrawal was made without the instruction, check, order, direction or assent of plaintiff.

10. Subsequent to July 1, 1985, plaintiff made numerous requests for reimbursement of the funds which were withdrawn on that date. Further, plaintiff has fully performed all terms and conditions of its agreement with defendant.

11. Defendant refuses and continues to refuse to reimburse plaintiff for the funds withdrawn on July 1, 1985.

12. Defendant has not performed its agreement with plaintiff in that it disbursed funds on deposit in the subject account without the instruction, check, order, direction or assent of plaintiff.

13. Plaintiff has not ratified the July 1, 1985 withdrawal.

14. By reason of defendant's breach, plaintiff has sustained damages in the sum of $157,432.37 plus interest.

WHEREFORE, plaintiff, MICHAEL MA, demands judgment against defendant, CONTINENTAL ILLINOIS NATIONAL BANK & TRUST COMPANY, for the sum of $157,432.37 together with interest at the legal rate to the date of judgment; the costs of this action and such other and further relief as this Court shall deem just and equitable.

COUNT II
CONVERSION

1-7. Plaintiff realleges and incorporates by reference paragraphs 1 through 7, inclusive, of Count I of this Complaint as paragraphs 1 through 7, inclusive of this Count II.

8. On July 1, 1985, plaintiff had on deposit with defendant the sum of $157,432.37, in the subject account for safekeeping to be disbursed only in conformity with plaintiff's instructions.

9. On July 1, 1985, defendant then and there converted for its own use and withdrew or caused to be withdrawn all of the funds on deposit in the subject account, thereby depriving plaintiff of the use and enjoyment of said funds.

10. Subsequent to July 1, 1985, plaintiff made numerous demands that defendant re-deliver and return the funds withdrawn on July 1, 1985 from the subject account.

11. Defendant has refused and continues to refuse to re-deliver the funds or to pay the value of the funds or any part to plaintiff.

12. Plaintiff has not ratified the July 1, 1985 withdrawal.

13. By reason of defendant's wrongful conversion of plaintiff's monies, plaintiff sustained damages in the sum of $157,432.37, plus interest, no part of which has been paid.

WHEREFORE, plaintiff, MICHAEL MA, demands judgment against defendant, CONTINENTAL ILLINOIS NATIONAL BANK & TRUST COMPANY, for the sum of $157,432.37 together with interest at the legal rate to the date of judgment; punitive damages in excess of $1,000,000; the costs of this action and such other and further relief as this Court shall deem just and equitable.

COUNT III
NEGLIGENCE

1-7. Plaintiff realleges and incorporates by reference paragraphs 1 through 7, inclusive, of Count I of this Complaint as paragraphs 1 through 7, inclusive of this Count III.

8. At all times relevant, defendant had a duty to protect the funds of plaintiff held on deposit at defendant's bank and to only pay out such funds in conformity with plaintiff's instructions.

9. On July 1, 1985, defendant wilfully, or recklessly or negligently paid out the funds held on deposit in the subject account. Said funds were paid without the instruction, check, order, direction or assent of plaintiff, or the appropriate order of a court with jurisdiction.

10. Illinois law provides a statutory method whereby foreign judgments may be registered in the United States to be accorded full faith and credit and enforced. Ill. Rev. Stat. ch. 110, ¶¶12-601-12-617, ¶¶12-618-12-626.

11. Defendant claims to have paid the funds from said money market account in satisfaction of a foreign judgment entered by the official receiver of Hong Kong.

12. Notwithstanding defendant's claim, no registration of the Hong Kong receiver's judgment was ever entered and proper notice was never served on plaintiff.

13. As a result of defendant's breach of its duties, plaintiff has been damaged in the sum of $157,432.37, plus interest.

WHEREFORE, plaintiff, MICHAEL MA, demands judgment against defendant, CONTINENTAL ILLINOIS NATIONAL BANK & TRUST COMPANY, for the sum of $157,432.37 together with interest at the legal rate to the date of judgment; punitive damages in excess of $1,000,000; the costs of this action and such other and further relief as this Court shall deem just and equitable.

COUNT IV
DUE PROCESS

1-2. Plaintiff realleges and incorporates by reference paragraphs 1 through 2, inclusive, of Count III of this Complaint as paragraphs 1 through 2, inclusive, of this Count IV.

3. Jurisdiction is based on this Court's Federal Question Jurisdiction 28 U.S.C. §1331.

4-11. Plaintiff realleges and incorporates by reference paragraphs 5 through 12, inclusive, of Count III of this Complaint as paragraphs 4 through 11 of this Count IV.

12. As a result of defendant's breach and failure to require registration of the purported judgment against plaintiff, prior to withdrawing or causing to be withdrawn all

the funds in the subject account, plaintiff's due process rights have been denied and plaintiff has been damaged in the sum of $157,432.37, plus interest.

WHEREFORE, plaintiff, MICHAEL MA, demands judgment against defendant, CONTINENTAL ILLINOIS NATIONAL BANK & TRUST COMPANY, for the sum of $157,432.37 together with interest at the legal rate to the date of judgment; punitive damages in excess of $100,000; the costs of this action and such other and further relief as this Court shall deem just and equitable.

Plaintiff demands trial by jury

By: /s/ Hal R. Morris
One of the Attorneys for
Plaintiff, Michael Ma

Eugene J. Kelley, Jr.
Hal R. Morris

Of Counsel:
Arnstein, Gluck, Lehr & Milligan
7500 Sears Tower
Chicago, Illinois 60606
(312) 876-7100

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case Number: 88 C 7827 Date: DEC. 16 1988

Name of Assigned Judge: WILLIAM T. HART

Case Title: Michael Ma v. Continental Illinois National Bank & Trust Company of Chicago

* * * * *

MOTION: Plaintiff's Motion to Voluntarily Dismiss Counts II and IV.

* * * * *

DOCKET ENTRY:

(1) ☐ Judgment is entered as follows:

(2) ☒ [Other docket entry:]

Plaintiff's motion to voluntarily dismiss counts II and IV without prejudice is granted on condition that plaintiff may not reinstate said counts without leave of court upon properly noticed motion.

* * * * *